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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOHN EDWARD ROMERO, Appellant.	2 CA-CR 2009-0355 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800418

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Adriana M. Rosenblum — Phoenix
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, John Romero was convicted of first-degree murder and tampering with physical evidence and sentenced to a prison term of natural life for the

murder followed by the presumptive, one-year term on the remaining charge. On appeal, he contends 1) the trial court should have severed his trial from that of his codefendant; 2) the court admitted evidence in violation of his confrontation rights; 3) there was insufficient evidence to support the conviction of tampering with evidence; and 4) the court violated his constitutional right to have a jury determine aggravating circumstances for sentencing purposes. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the verdict[s]." *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). On the evening of June 2, 2008, Patrick G. and Annie L. went to Israel Otero's mobile home to collect an unpaid debt. When they arrived, Annie waited in Patrick's car while Patrick talked to Otero in the carport. Several minutes later, Patrick told Annie he was going inside to look at a plasma television. Annie then heard several "loud pounding sounds . . . something like fighting [or] hitting," coming from inside the residence. She got out of the car and shouted, "What[']s going on in there?" Romero came out of the mobile home and ran toward Annie with a bat in his hand. He chased her around the car, swinging the bat at her, hitting her twice, and telling her to "shut the fuck up." Otero then came out and told Romero to leave Annie alone, and that "he would deal with [her]." Otero called to a third man, Jonathan Ramil, to watch over Annie as she lay on the ground.

¶3 Otero then said they would put Patrick's body "where they talked about before," and he and Romero brought the body out of the trailer and loaded it into a truck that Romero often drove. Romero drove away in the truck, and Otero followed in

Patrick's car with Annie in the passenger seat. Ramil stayed behind to "clean up the mess." The two vehicles drove down a dirt road, and Romero eventually stopped the truck and left Patrick's body under a tree. Otero drove Patrick's car through a fence, stopped in a field, and used Annie's waitress apron to wipe down the car. Otero and Annie then walked to the road where Romero picked them up in the truck.

¶4 On the way back to Otero's mobile home, the truck ran out of gas, so they left it at the side of the road and Ramil picked them up in Otero's car. After they returned to the mobile home, Otero divided the money from Patrick's wallet and talked about cleaning up the mess. Otero gave Ramil a box cutter and told him to remove the blood-stained carpet and burn it. The men allowed Annie to leave, telling her not to say anything about what had happened. Within a few hours, Annie contacted the police, who located Patrick's body, his car, and the truck.

¶5 Romero and Otero were charged with first-degree murder and tampering with physical evidence, and were tried jointly.[1] Romero was convicted and sentenced as described above. This appeal followed.

Discussion

I. Severance

¶6 Romero argues the trial court should have severed his trial from that of codefendant Otero. He contends evidence admitted against Otero also implicated Romero in the murder and he was thereby prejudiced as a result of the joint trial.

[1]The trial court granted Ramil's motion to be tried separately.

Specifically, the court admitted into evidence the lyrics of a rap song Otero had written about the murder and evidence of Otero's attempted escape from prison.[2]

¶7 Rule 13.4(c), Ariz. R. Crim. P., provides that a defendant's motion to sever must be made prior to trial and, if denied, "renewed during trial at or before the close of the evidence." Although Otero moved for severance before trial, Romero did not join the motion. And, Romero concedes that he neither filed "a separate motion to sever, nor did he renew any motion to sever during . . . trial." Each defendant must move to sever before trial and renew his motion during trial, in order to preserve the issue for appeal. "[D]efendants are rarely similarly situated with respect to the evidence presented," and "we cannot presume that one defendant speaks on behalf of his codefendant in moving to sever trials." *State v. Flythe*, 219 Ariz. 117, ¶¶ 7-8, 10, 193 P.3d 811, 813 (App. 2008). Thus, because Romero failed either to file his own motion or join in Otero's, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶8 "[I]n the interest of judicial economy, joint trials are the rule rather than the exception." *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). However,

[2]Romero also contends the trial court should have severed the trials because Romero was unable to cross-examine Otero's wife after Otero invoked the marital communications privilege under A.R.S. § 13-4062(1). Because Romero makes a separate argument that his confrontation rights were violated on the same grounds, we address this argument in the following section.

Rule 13.4(a) requires severance when "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." We review a trial court's decision not to sever a trial for an abuse of discretion. *See Murray*, 184 Ariz. at 25, 906 P.2d at 558. A defendant is prejudiced to such a significant degree that severance is required when "evidence admitted against one defendant is facially incriminating to the other defendant" or "has a harmful rub-off effect on the other defendant." *State v. Grannis*, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995) (internal quotations omitted), *overruled in part on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010).

A. Admission of Song Lyrics

¶9 During trial, Patrick M. was asked to read the lyrics of a rap song Otero had written while they were in jail together. Otero had described the song as "the dedication [he] wrote to that one fool[,]" an apparent reference to Patrick's murder. The song included the following lyrics:

> It was way best for both sides to keep cool till I paid, but you tripped cuz you're bad.
>
> . . . .
>
> Kept callin, harassin, and come to my pad. Common sense this fool's lackin, when his skull gets to crackin . . . . Come in with no senses like you one of the baddest . . . talks of takin my plasmas. Somebody tell this motha fucka, alive he aint' leavin. . . . I'll flip and keep clubbin your ass in the face, in the back of the neck. . . . Now you're fucked, and I'm booked, and all of Willcox is shook because you're dead now . . . .

Romero argues the song would not have been admissible against him at a separate trial, and that, because it corroborated much of Annie's testimony, and because the murder

could not have been committed without the aid of at least one other person, the lyrics "necessarily implicated [him]."

¶10 To the extent the lyrics are incriminating for the reasons Romero suggests, they were merely cumulative to other properly admitted evidence. Romero has therefore failed to establish he was prejudiced by their admission. *See State v. Fulminante*, 161 Ariz. 237, 245-46, 778 P.2d 602, 610-11 (1988) (error harmless when inadmissible evidence cumulative to properly admitted evidence).

¶11 The jury was presented with ample evidence, including Annie's detailed testimony, that implicated Romero in the murder. And, officers collected physical evidence that corroborated Annie's version of the events. Officers present at the scene testified that Patrick's car had been driven through a barbed-wire fence, and that two sets of footprints led away from it, one of which matched Annie's boots; a waitress apron was found near the car; and officers initially found the truck parked where Annie said they had left it after it ran out of gas. Furthermore, officers found blood spatter on the truck that matched Patrick's DNA.[3] Finally, Romero's DNA was found on the ropes that had been used to bind Patrick's hands and feet.

¶12 And to the extent Romero claims the lyrics had a harmful "rub-off" effect on him, the trial court instructed the jury to treat each defendant separately, "as if [each] defendant were being tried alone." We presume the jury followed the trial court's instructions. *See State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006); *see also Grannis*, 183 Ariz. at 58, 900 P.2d at 7 (recognizing curative jury instruction sometimes

[3]Deoxyribonucleic acid.

sufficient to alleviate any risk of prejudice that might result from joint trial). Therefore, even assuming arguendo the court erred by not severing Romero's trial from that of Otero and that the error could be characterized as fundamental, Romero has failed to establish he was prejudiced by the lyrics. He therefore has not met his burden under a fundamental error analysis. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (burden on defendant to demonstrate prejudice).

B. Otero's Attempted Escape

¶13 The trial court allowed the state to introduce evidence that Otero was in custody at the time of trial and that he had attempted an escape. A detention lieutenant testified that while in jail, Otero had removed mortar around some of the bricks in his cell. Romero contends this testimony would not have been admissible against him at a separate trial and, because "[he] and Otero were related by marriage . . . the evidence against Otero was necessarily prejudicial to [him]." "However, the mere introduction of evidence concerning one defendant's conduct that does not involve the other defendant generally does not constitute sufficient grounds for severance." *State v. Van Winkle*, 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996).

¶14 Nothing in the evidence about Otero's attempted escape implicated Romero. In fact, the lieutenant testified that Romero had nothing to do with the escape attempt. Thus, Romero has failed to show how the failure to sever the defendants' trials and the admission of this testimony constituted fundamental, prejudicial error. As we have noted above, the trial court appropriately instructed the jury to treat each defendant separately and to consider the evidence only as it applied to each defendant individually,

and we presume the jury followed this instruction. *See Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d at 847.

¶15 We conclude that, even assuming the court's failure to sever the defendants' trials was fundamental error, Romero has not sustained his burden of demonstrating the error was prejudicial. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. He is not, therefore, entitled to relief on this basis.

II. Right of Confrontation

¶16 Romero next contends his confrontation rights under the Sixth Amendment to the United States Constitution and article II, §§ 23 and 24 of the Arizona Constitution were violated by the admission of the transcript of Otero's wife's prior testimony and Otero's song lyrics.[4] Romero argues he was precluded from cross-examining Otero's wife because Otero had invoked the spousal privilege and he was unable to cross-examine Otero about his song lyrics because Otero did not testify. We review challenges to the admissibility of evidence under the Confrontation Clause de novo. *State v. Bronson*, 204 Ariz. 321, ¶ 14, 63 P.3d 1058, 1061 (App. 2003).

¶17 The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the Supreme Court held that the Confrontation Clause bars the admission of testimonial statements made by a witness

[4]Although Romero invokes the Arizona Constitution, he makes no separate argument that its protections differ from those of the federal constitution. We therefore address his claim only under the United States Constitution. *See State v. Nunez*, 167 Ariz. 272, 274 n.2, 806 P.2d 861, 863 n.2 (1991).

who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *See also State v. King*, 213 Ariz. 632, ¶ 17, 146 P.3d 1274, 1279 (App. 2006).

A. Anna Otero's Prior Testimony

¶18 When Anna Otero testified at Ramil's trial, Romero had no opportunity to cross-examine her. However, in admitting the transcript of her prior testimony, the trial court concluded she was unavailable because Otero had asserted the spousal privilege and that her prior testimony had been under oath and she had been subject to cross-examination. The court also found she had been "cross-examined by counsel for a party with the same interests and motivation in cross-examining her as these defendants would have." The court apparently was relying on Rule 19.3(c), Ariz. R. Crim. P., which provides that prior testimony is admissible if "[t]he party against whom the former testimony is offered . . . had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party now has."

¶19 Romero contends that "[b]y suggesting that an attorney who was representing Jonathan Ramil adequately cross-examined Anna . . . at a different trial on behalf of [Romero], the court completely abrogated [his] Constitutional Right." We agree. But Romero has not persuaded us, nor does the record establish, that this error affected the jury's verdict. *See State v. Parks*, 211 Ariz. 19, ¶ 54, 116 P.3d 631, 643 (App. 2005) (Confrontation Clause violations subject to harmless error analysis); *see also State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) (error harmless if we can say "beyond a reasonable doubt that the error had no influence on the jury's judgment").

¶20 Contrary to Romero's claim, Anna's testimony was not "critical" in placing him at the scene before the murder. Jennifer M. testified she had been with Anna at the trailer and corroborated Anna's testimony. A law enforcement officer also testified about his interview of Romero, during which Romero had admitted he had been at Otero's trailer the night of the murder. Anna's testimony also was corroborated by Annie's testimony. And, although Romero discounts the credibility of Annie's testimony, referring to her as "meth[amphetamine] addict extraordinaire," Annie admitted that she had been using drugs around the time of the offenses. The jury had the opportunity to evaluate her credibility as well as that of the other witnesses. *See State v. Rivera*, 210 Ariz. 188, ¶ 28, 109 P.3d 83, 89 (2005) (credibility of witnesses is for jury to decide). Thus, any error in admitting Anna's prior testimony was harmless beyond a reasonable doubt. *See Bible*, 175 Ariz. at 588, 858 P.2d at 1191.

B. Song Lyrics

¶21 Romero also argues his confrontation rights were violated when Otero's song lyrics were admitted into evidence because he was unable to cross-examine Otero. Otero had invoked his Fifth Amendment right not to testify. Romero did not object below to admission of the lyrics; we therefore review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. And, even assuming the lyrics were admitted in violation of Romero's rights under the Confrontation Clause, any such error was harmless beyond a reasonable doubt. The information contained in the lyrics was merely cumulative to other testimony and evidence that was properly admitted at trial. *See Fulminante*, 161 Ariz. at 245-46, 778 P.2d at 610-11.

III. Sufficiency of Evidence

¶22 Romero next contends there was insufficient evidence to support his conviction for tampering with physical evidence. "A person commits tampering with physical evidence if, with intent that it be . . . unavailable in an official proceeding . . . which such person knows is about to be instituted, such person . . . [d]estroys, . . . conceals or removes physical evidence with the intent to impair its verity or availability . . . ." A.R.S. § 13-2809(A)(1). "When considering claims of insufficient evidence, 'we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction.'" *State v. Fimbres*, 222 Ariz. 293, ¶ 4, 213 P.3d 1020, 1024 (App. 2009), *quoting State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). Substantial evidence is "evidence 'that reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005), *quoting State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 469 (1997). "Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation omitted).

¶23 Romero did not move below for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P.; thus he has forfeited review for all but fundamental, prejudicial error. *See Stroud*, 209 Ariz. 410, n.2, 103 P.3d at 914 n.2. "It is, however, 'fundamental error to convict a person for a crime when the evidence does not support a conviction.'" *Id.*, *quoting State v. Roberts*, 138 Ariz. 230, 232, 673 P.2d 974, 976 (App. 1983).

¶24 Romero argues the evidence was insufficient to support his conviction for tampering because "[a]ll the evidence regarding tampering with evidence came about with respect to the actions of Jonathan Ramil . . . who removed the carpeting from Otero's trailer and burned or attempted to burn it along with various other items of evidence." He also argues he could not be found guilty as an accomplice for destroying evidence at the mobile home because this was a "separate offense," and that he could not be guilty of this offense simply because he was found guilty of a crime committed earlier.

¶25 We need not decide whether the evidence supported a conviction under an accomplice theory of liability, because there was overwhelming evidence that Romero had been involved in the murder and the subsequent cover-up. The state presented evidence that Romero tampered with evidence directly by washing his shoes after the murder, and by moving Patrick's body. Additional evidence established that Romero had placed Patrick's body in the truck after the beating and abandoned it in a field, and that police found Patrick's blood on the truck's tail gate.[5] Thus, there was sufficient evidence to support the conviction.

[5]In its opening statement, the state said, "When we are all done . . . you [will] believe beyond a reasonable doubt that [they] killed Patrick . . . tampered with the physical evidence, moved his body . . . trying to make sure that it wasn't available to be used against them here today." Romero therefore argues that "[t]he allegations of tampering with physical evidence and moving the victim's body should be read in the disjunctive, not as one series of acts." It is unclear whether he is arguing that the state intended the act of moving the body to be a separate offense from that of tampering, or whether he is making this argument himself. Because Romero neither develops this argument nor cites any authority for it, we do not consider it further. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellant's brief must contain argument "with citations to the authorities, statutes and parts of the record relied on"); *see also State v. Moody*, 208 Ariz.

IV. Right to Jury Trial

¶26 Although he did not raise this argument below, Romero contends the trial court should have granted him a jury trial on the issue of aggravating factors, pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004). "A trial court has broad discretion in sentencing and, if the sentence imposed is within the statutory limits, we will not disturb the sentence unless there is a clear abuse of discretion." *State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001). But "[w]hether a trial court may employ a given factor to aggravate a sentence presents a question of law we review *de novo*." *State v. Alvarez*, 205 Ariz. 110, ¶ 6, 67 P.3d 706, 709 (App. 2003).

¶27 In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The court reiterated this holding in *Blakely*, applying it to Washington's sentencing scheme. 542 U.S. at 296. Because Romero did not raise this issue below, he has forfeited the right to relief for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. He does not assert fundamental, prejudicial error on appeal and so it is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶28 In any event, we find there was no error, let alone fundamental error. On the last day of trial, the state argued there is no presumptive term for first-degree murder

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424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (failure to argue a claim and support it with authority constitutes abandonment and waiver of that claim).

and that, therefore, should Romero be convicted of first-degree murder, the trial court could find aggravating factors. The court agreed, finding *Blakely* does not apply to first-degree murder, and determining it could find aggravating and mitigating factors and impose the sentence it believed appropriate, whether natural life or life without parole for twenty-five years. The court found several aggravating factors and sentenced Romero to a term of natural life.[6] The court did not err.

¶29 In *State v. Fell*, 210 Ariz. 554, ¶ 11, 115 P.3d 594, 597-98 (2005), our supreme court found the *Apprendi/Blakely* principles are not implicated when a term of natural life is imposed under Arizona's non-capital murder sentencing scheme. The court stated that "the Sixth Amendment does not require that a jury find an aggravating circumstance before a natural life sentence can be imposed," because Arizona's sentencing scheme "provides the superior court with the discretion to sentence an offender within a range . . . from life to natural life . . . for non-capital first degree murder."[7] *Id.* ¶¶ 15, 19. The court rejected the argument that, for purposes of the non-capital sentencing statutes, a life term of imprisonment with the possibility of some form

[6]Romero's claim appears to be confined to the trial court's sentence imposed on the murder conviction. To the extent he is also arguing the court committed the same error with respect to the tampering conviction, that argument lacks merit as well. Neither *Apprendi* nor its progeny applies when the defendant has received the presumptive prison term because the presumptive term is the "statutory maximum." *State v. Brown*, 209 Ariz. 200, ¶¶ 12-13, 99 P.3d 15, 18 (2004). Because Romero received the presumptive term on the tampering conviction, he was not entitled to have a jury find the existence of any aggravating circumstances.

[7]Thus Romero's further claim, which he makes with no citation to supporting authority, that "[o]f course, there is a presumptive sentence for first degree murder . . . life without possibility of parole for 25 years [, and] natural life [would be the aggravated sentence,]" is completely without support in the law.

of early release is the presumptive term, whereas natural life is essentially the "aggravated" term. *Id*. ¶¶ 13-14. Here, the court did not err in failing, sua sponte, to submit the determination of whether any aggravating circumstances existed to a jury before sentencing Romero to a prison term of natural life for murder.

Disposition

¶30 For the reasons stated above, we affirm Romero's convictions and sentences.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge